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HOME FIELD ADVANTAGE? AN ANALYSIS OF WORKERS' COMPENSATION CHOICE-OF-LAW AND CHOICE-OF-FORUM PROVISIONS IN NFL CONTRACTS

*Bryan Holbrook**

I. INTRODUCTION

Over the last three years, it seems as though the National Football League (NFL) has spent as much time in the courtroom as it has on the gridiron. On August 4, 2011, the NFL Players Association (NFLPA) and NFL team owners reached an agreement on a ten-year labor deal, thereby ending the highly publicized 130-day lockout that had been the source of much litigation.¹ Media criticism notwithstanding, the NFL went on to have one of its most successful seasons ever, with Super Bowl XLVI being the most viewed program in U.S. television history.² However, while NFL players and coaches may have returned to the field, it does not appear as though the league's attorneys will be leaving the courtroom anytime soon.

In addition to the lockout litigation, a number of players have recently obtained mixed results in both state and federal courts when filing workers' compensation claims in jurisdictions other than those stipulated in their contracts.³ In light of these mixed results, several cases were appealed to the Court of Appeals for the Seventh Circuit, the Court of Appeals for the Ninth Circuit, and the Court of Appeals of Maryland.⁴ It appears that both the NFL and NFLPA recognize the significance of this litigation, as the introductory paragraph contained within Article 41 of the NFL Collective Bargaining Agreement (NFL

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1. See generally Adam Schefter, *Sources: Deal to End Lockout Reached*, ESPN.COM (Jul. 25, 2011), http://espn.go.com/nfl/story/_id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say. See also NFL PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT (2011), available at http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA_Searchable.pdf [hereinafter *NFL CBA*].

2. See *Super Bowl Telecast Sets U.S. TV Viewership Record for Third Consecutive Year*, SPORTS BUS. DAILY (Feb. 7, 2012), <http://www.sportsbusinessdaily.com/Daily/Issues/2012/02/07/Media/NFL-Media.aspx> (noting that 2012 marked the "seventh straight year that the Super Bowl has seen a growth in viewership").

3. See *NFL Workers' Compensation Court Cases*, SPORTS BUS. DAILY (Jan. 23, 2012), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/01/23/Labor-and-Agents/Workers-comp-cases.aspx>.

4. *Id.*

CBA) states that “parties shall continue to discuss in good faith appropriate reforms and revisions to the provisions of this Agreement and the Player Contract related to workers’ compensation issues.”⁵ Additionally, Article 41, Section 6 of the NFL CBA states:

The parties shall retain the positions they held prior to this Agreement with respect to all existing litigation and arbitration involving workers’ compensation issues . . . regarding offset issues or choice of law and forum provisions contained in NFL Player Contracts, and nothing in this article shall affect positions taken in any such pending litigation.⁶

Accordingly, this Comment will analyze a number of NFL workers’ compensation cases containing choice-of-law and choice-of-forum questions and will demonstrate that “[e]xpress agreement between employer and employee that the statute of a named state shall apply is ineffective either to enlarge the applicability of that state’s statute or to diminish the applicability of the statutes of other states.”⁷ This Comment will then argue that regardless of the NFL’s power, prestige, and prosperity as the most successful sports league of all time, the league may not rely on employment contracts or collective bargaining agreements to supersede state policy.

Part II of this Comment provides a general overview of workers’ compensation in the United States as well as the different approaches that have been adopted amongst the states regarding the applicability of their respective statutes. Part III discusses Supreme Court precedent relating to workers’ compensation. Part IV illustrates the varying treatment that professional athletes receive from state to state. Part V discusses federal preemption issues as well as the role and jurisdiction of NFL arbitrators. Part VI discusses recent NFL workers’ compensation cases and outlines the issues that are typically in dispute in such cases, while Part VII contains an analysis of the NFL cases. Lastly, Part VIII suggests a strategy to be utilized by the NFL and NFLPA in an attempt to avoid excessive litigation over the choice-of-law and choice-of-forum provisions contained in NFL player contracts.

II. BACKGROUND

Although workers’ compensation statutes vary from state to state, there are certain basic features that are typical of most statutes. Accordingly, this Part will begin by discussing fundamental features of workers’ compensation. Next, it will briefly discuss the

5. *NFL CBA*, *supra* note 1, at 176.

6. *Id.* at 179.

7. 1 LEX K. LARSON, *LARSON’S WORKERS’ COMPENSATION* § 143.07[1] (2012).

recommendations of the National Commission on State Workmen's Compensation Laws. Lastly, it will outline the different approaches the courts have taken regarding whether parties may contract their way into or around the applicable state statutes.

A. Worker's Compensation

The idea behind workers' compensation is that an employee who suffers a "personal injury by accident arising out of and in the course of employment" should be automatically entitled to certain benefits as compensation for such injury.⁸ Accordingly, negligence or contributory fault by either the employee or the employer does not reduce or enlarge the employee's entitlement to compensation.⁹ However, workers' compensation coverage is not unlimited. Rather, it is available only to persons having the status of "employee," and thereby excludes independent contractors and other similarly situated individuals.¹⁰ Additionally, by agreeing to accept workers' compensation from the employer, the employee and his or her dependents forfeit the right to sue the employer for damages as a result of the injury.¹¹ Thus, by avoiding litigation, employees are assured relatively prompt payment for injuries arising out of the course of their employment while employers are protected from high negligence awards that could adversely affect a company's financial status.

B. The National Commission on State Workmen's Compensation Laws

Prior to 1972, state workers' compensation laws varied tremendously. As such, the National Commission on State Workmen's Compensation Law (the Commission) issued recommendations designed to create a more uniform approach that promoted employee choice.¹² Accordingly, in virtually all states, an employee may now choose between filing a workers' compensation claim in (1) the state where the injury occurred, (2) the state where the employment was principally localized, or (3) the state where the employee was hired.¹³

8. *Id.* § 1.01 (2012) (explaining that "benefits to the employee include cash-wage benefits, usually around one-half to two-thirds of the employee's average weekly wage, and hospital, medical, and rehabilitation expenses").

9. *Id.*

10. *Id.*

11. *Id.* This is applicable insofar as negligence and contributory fault are concerned. However, state laws may vary in the case of an intentional tort by the employer, intoxication of the employee, or similarly egregious acts that have been excluded from coverage by the state legislature.

12. *Id.* § 143.01.

13. *Id.*

The first aspect of the Commission's recommendation has been interpreted as a proposition that an in-state injury can "*never*" be excluded from coverage.¹⁴ Supreme Court precedent appears to support and is perhaps the basis for such an interpretation, as the Court has ruled that a state retains "constitutional authority . . . to legislate for the bodily safety and economic protection of employees injured within it" and has pointed out that "[f]ew matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power."¹⁵ Furthermore, the in-state injury aspect has not been limited to the coverage of "acute injuries,"¹⁶ as many states have broadly defined the in-state injury component to include "cumulative trauma."¹⁷ Generally, an acute injury occurs as the result of a specific accident such as a slip, fall, or the lifting of an object.¹⁸ Conversely, cumulative trauma may include a series of traumatic events arising out of and in the course of employment,¹⁹ which may transpire over several years.²⁰

Despite the Commission's use of the word "or" when formulating its recommendations above, some states have decided to read recommendations (2)—the state where the employment was principally localized—and (3)—the state where the employee was hired—conjunctively, so that both are required before an employee can recover for injuries that occur outside of the state.²¹ For example, Virginia

14. *Id.* (emphasis added).

15. *Pac. Emp'rs. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 503 (1939). There is one narrow exception to the "never" interpretation with respect to the exclusion of in-state injuries, as some states deny coverage to transient employees upon the satisfaction of certain conditions. *See* LARSON, *supra* note 7, § 143.01[3] (citing the California reciprocity statute, Cal. Labor Code § 3600.5 and noting that California and states with similar approaches generally require that the employee be covered in another state and that the other state be willing to grant reciprocity).

16. *See, e.g.*, 1 NORMAN E. HARNED, KENTUCKY WORKERS' COMPENSATION § 13.02 (2012); 1 WARREN L. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES & WORKERS' COMPENSATION § 4.05 (2012); 1 KIM E. PRESBREY, ILLINOIS WORKERS' COMPENSATION GUIDEBOOK § 7.03 (2012) (citations omitted).

17. *See* LARSON, *supra* note 7, § 50.04 (citing *Burrell & Sons, Ltd. v. Selvage*, 90 L.J. 1340 (H.L. 1921) (awarding compensation to an employee for the disabling effect of numerous cuts and scratches which eventually led to infection and arthritis)).

18. 1 NORMAN E. HARNED, KENTUCKY WORKERS' COMPENSATION § 13.02 (2012).

19. *See* KY. REV. STAT. ANN. § 342.0011 (LexisNexis 2012).

20. *See, e.g.*, 1 NORMAN E. HARNED, KENTUCKY WORKERS' COMPENSATION § 13.08 (2012) (citing *Haycraft v. Corhart Refractories Co.*, 544 S.W.2d 222 (Ky. 1976) (apportioning compensation to employee who had suffered two work-related and two non-work related back injuries during his 17 years of employment which required him to perform heavy labor); *Prudential Overall Supply v. Workers' Comp. Appeals Bd.*, 76 Cal. Comp. Cases 683 (Cal. Ct. App. 2011) (awarding compensation for cumulative trauma to both knees and low back of garment coordinator employee whose job duties included gathering garments, loading them into carts, and taking them to a loading dock, which required the employee to engage in frequent bending, stooping, and kneeling)).

21. LARSON, *supra* note 7, § 143.01[2] (noting that this result can be attributed to judicial

requires that “the place of contract and the employer’s place of business are both within the state” and does not allow coverage at all if “the contract is for services exclusively outside the state.”²² On the other hand, some states have chosen to disjunctively analyze the employee’s contacts with the state as well as the principal location of the employment.²³ This approach can be particularly helpful in the context of transient employment, which some courts have classified as “a fact-dependent determination that must be made on a case-by-case basis.”²⁴ Courts adopting this view believe that “the inquiry requires more than simply tallying up the quantity of time the employee spends in each jurisdiction” and instead look to the purpose of the employment.²⁵

Lastly, where an employee was hired has also been interpreted quite broadly. For example, the California Workers’ Compensation Appeals Board has ruled that a job offer via a phone conversation while the employee is within the state may be sufficient even if the written contract is signed in another state.²⁶ In support of this position, the Board stated that whether or not an employment relationship exists “cannot be determined simply from technical contractual or common law conceptions of employment”²⁷ Rather, courts should look to “the history and fundamental purposes underlying the [Workmen’s Compensation] Act.”²⁸

C. Choice-of-Law and Choice-of-Forum Provisions

As indicated above, it is generally accepted that contractual agreements cannot effectively enlarge or diminish the applicability of state statutes.²⁹ However, the Supreme Court has also indicated that there is generally “a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions.”³⁰

decision in some states and legislative action in others).

22. *Id.*

23. *See id.* (citing Texas Labor Code § 406.071, which explains, “[a]n employee has significant contacts with this state if the employee was hired or recruited in this state and the employee: (1) was injured not later than one year after the date of hire; or (2) has worked in Texas for at least 10 working days during the 12 months preceding the date of injury.”).

24. *See Pro-Football, Inc. v. Tupa*, 14 A.3d 678, 683 (2011) (citing *Hodgson v. Flippo Constr. Co.*, 883 A.2d 211 (2005)), *cert. granted*, 21 A.3d 1063 (Md. June 17, 2011).

25. *Id.* at 683.

26. *See Brache v. Tampa Bay Storm*, 2010 Cal. Wrk. Comp. P.D. LEXIS 339, at *22 (Cal. Wrk. Comp. P.D. Aug. 26, 2010).

27. *Id.* at 19 (citing *Laeng v. Workmen’s Comp. Appeals Bd.*, 494 P.2d 1, 4 (1972)).

28. *Id.* at 5 (citations omitted); *B. P. Schulberg Prod. v. Cal. Emp’t Comm’n*, 66 Cal.App. 2d 831, 834–35 (1944).

29. *See LARSON*, *supra* note 7, § 143.07[1].

30. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). *See*

Accordingly, this Part will discuss attempts to contract around applicable statutes as well as attempts to contract into inapplicable statutes.

In 1935, the Supreme Court held that “[p]rima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted.”³¹ As explained by Professor Larson,³² the overriding considerations are that workers’ compensation is not a private matter to be settled by two parties and that the public’s interest cannot be discounted because of individual agreements.³³ This contention finds support in *Pacific Employers Insurance Co. v. California*, discussed *infra*, where the Supreme Court relied heavily upon a California statute stating “[n]o contract, rule or regulation shall exempt the employer from liability for the compensation fixed by this act.”³⁴ Consequently, it is generally accepted that the most egregious employment agreements are those that purport to destroy jurisdiction where it would otherwise exist.³⁵

Lastly, an employee’s right to workers’ compensation is a product of the employment relationship and would otherwise not exist.³⁶ Thus, in order for an employment agreement to be governed under the laws of a particular state, “that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”³⁷ In short, the parties to an employment agreement cannot unilaterally confer jurisdiction upon a state’s court system by virtue of private contract.

III. SUPREME COURT PRECEDENT

There are two famous Supreme Court cases dealing with workers’ compensation that continue to be cited in nearly every choice-of-law and choice-of-forum dispute. The first, *Alaska Packers Association v. California*,³⁸ was decided in 1935 and established that for a foreign state’s law to supersede the law of a forum state, the foreign state must

also *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

31. *Alaska Packers Ass’n v. California*, 294 U.S. 532, 547 (1935).

32. See, e.g., *Pro-Football, Inc. v. Tupa*, 14 A.3d 678, 686 (2011), *cert. granted*, 21 A.3d 1063 (Md. June 17, 2011).

33. See LARSON, *supra* note 7, § 143.07.

34. *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 504 (1939).

35. See LARSON, *supra* note 7, § 143.07 (citing *Alaska Packers Ass’n v. California*, 294 U.S. 532 (1935)).

36. See *Chicago Bears v. Haynes*, 816 F. Supp. 2d 534, 540 (N.D. Ill. 2011).

37. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981).

38. 294 U.S. 532 (1935).

demonstrate a superior government interest.³⁹ The second, *Pacific Employers Insurance Co. v. California*,⁴⁰ upheld *Alaska Packers* and went on to articulate the limitations of the Full Faith and Credit Clause in the choice-of-forum context. This Part will discuss the cases in that order.

In 1935, the Alaska Packers Association (Association) appealed to the Supreme Court of the United States to overturn a judgment of the Supreme Court of California that upheld a compensation award by the Industrial Accident Commission to one of the Association's employees.⁴¹ The award was given and upheld pursuant to the statutes of California, where the contract was entered into; however, the contract was performed in Alaska, where the injury eventually occurred.⁴²

While the contract entered into between the employee and the Association stated that the parties would be bound by Alaska Workmen's Compensation law, Section 58 of the California Workmen's Compensation Act provided:

The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state.⁴³

After the Supreme Court recognized that states have the constitutional authority to impose a system of compensation for injuries upon the parties, it then set out to determine whether the due process clause prevents a state from imposing liability for injuries occurring in another state.⁴⁴ Ultimately, the Court concluded that "where the contract is entered into within the state . . . [t]he fact that [it] is to be performed elsewhere does not of itself put these incidents beyond reach of the power which a state may constitutionally exercise."⁴⁵ In reaching this decision, the Court noted that the Packers employed fifty-three workers for the summer in Alaska, the majority of who were from California. Given that the two states are roughly 3,000 miles apart and that the employment was seasonal in nature, the Court found that the California statute was not "given such an unreasonable application . . . to transcend

39. *Id.* at 549.

40. 306 U.S. 493 (1939).

41. *Alaska Packers Ass'n v. California*, 294 U.S. 532, 537 (1935).

42. *Id.*

43. *Id.* at 538 (citing CAL. WORKMEN'S COMPENSATION CODE § 58 (1917)). In upholding the award, the Court was satisfied with the California Supreme Court's disjunctive reading of the latter part of the statute which applies if the employee was a "resident of this state at the time of the injury *and* the contract of hire was made in this state." *Id.* (emphasis added).

44. *Id.* at 540.

45. *Id.* at 540–41.

constitutional limitations.”⁴⁶ The Court also noted the difficulties injured employees, as well as any potential witnesses, would encounter in returning to Alaska to prosecute their claims for compensation.⁴⁷

After concluding that the California statute did not involve an arbitrary or unreasonable exercise of state power, the Court analyzed the effect the statute had upon the employment agreement. In doing so, the court noted that “[l]egislation otherwise within the scope of acknowledged state power, not unreasonably or arbitrarily exercised, cannot be condemned because it curtails the power of the individual to contract.”⁴⁸

Lastly, the Court analyzed the conflicting state laws under the Full Faith and Credit Clause⁴⁹ and concluded that a rigid and literal enforcement of that clause that ignored the statute of the forum state “would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”⁵⁰ Rather than reach this absurd result by giving automatic effect to the Full Faith and Credit Clause, the Court explained that the courts of each state must be allowed to consider and balance the government interests of each state in reaching a decision.⁵¹ Thus, the forum state’s law does not apply if, and only if, the foreign state can demonstrate a superior government interest.⁵² Ultimately, the Court concluded that because “[t]he interest of Alaska [was] not shown to be superior to that of California,” there was no persuasive reason to prevent a California court from applying California law.⁵³

The U.S. Supreme Court confronted a similar Full Faith and Credit Clause issue in *Pacific Employers*, where a chemical engineer was a resident of Massachusetts and was regularly employed there under written contract, but was subsequently injured while working temporarily in California.⁵⁴ Although the employee remained subject to the general direction and control of the employer’s Massachusetts office while working in California,⁵⁵ he was able to institute proceedings before the California Commission because he was injured during the

46. *Id.* at 542.

47. *Id.*

48. *Id.* at 543 (citing *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 157–58 (1931)).

49. U.S. CONST. art. IV, § 1.

50. *Alaska Packers*, 294 U.S. at 547.

51. *Id.*

52. *Id.* at 549.

53. *Id.* at 550.

54. *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 497–98 (1939).

55. *Id.* at 497.

course of his employment within the state.⁵⁶

Just as it did in *Alaska Packers*, the California Supreme Court upheld an award by the California Industrial Accident Commission despite the contract provision purporting to render Massachusetts law the exclusive remedy available to the employee.⁵⁷ Under the Massachusetts statute, the employee is deemed to have waived the “right of action at common law or under the law of any other jurisdiction” in the absence of written notice to the employer that he or she elects to retain such rights.⁵⁸ On the other hand, the California statute provided that “[n]o contract, rule or regulation shall exempt the employer from liability for the compensation fixed by this act.”⁵⁹

In upholding the award, the California Supreme Court dismissed the petitioner’s assertions that because the contract was entered into in Massachusetts, and because the employee and employer consented to be bound by the Massachusetts Act, the Massachusetts statute was constitutionally entitled to full faith and credit in the courts of California. In affirming the decision, the U.S. Supreme Court noted that “the Full Faith and Credit Clause does not deny to the courts of California the right to apply its own statute awarding compensation for an injury suffered by an employee within the state.”⁶⁰ The Court went on to famously state:

To the extent that California is required to give full faith and credit to the conflicting Massachusetts statute it must be denied the right to apply in its own courts its own statute, constitutionally enacted in pursuance of its policy to provide compensation for employees injured in their employment within the state. It must withhold the remedy given by its own statute to its residents by way of compensation for medical, hospital and nursing services rendered to the injured employee, and it must remit him to Massachusetts to secure the administrative remedy which that state has provided. We cannot say that the full faith and credit clause goes so far.⁶¹

In short, the Court reiterated that there are limitations as to when the Full Faith and Credit Clause requires a state to enforce a judgment or apply the law of another state when doing so would contravene its own statutes or policy.⁶²

56. *Id.* at 498.

57. *Id.* at 497.

58. *Id.* at 498 (citing MASS. GEN. LAWS ANN. ch. 152, §§ 24–26 (West 1932)).

59. *Id.* at 499 (citing CAL. WORKMEN’S COMPENSATION CODE § 27(a) (Deering 1931)). *See also* Quong Ham Wah Co. v. Indus. Accident Comm’n of Cal., 184 Cal. 26 (1920)).

60. *Pac. Emp’rs Ins. Co.*, 306 U.S. at 501.

61. *Id.*

62. *Id.* at 502. The Court went on to state that “[i]t would be obnoxious to that policy . . . [to] require physicians and hospitals to go to another state to collect charges for medical care and

IV. WORKERS' COMPENSATION AND PROFESSIONAL ATHLETES

Because the workers' compensation statutes in most states do not expressly mention the treatment of professional athletes, courts have been charged with deciding whether or not athletes are eligible to receive workers' compensation.⁶³ Despite the occasional "assumption of risk" argument by an employer of a professional football player, it is generally accepted that professional football players may not be prohibited from recovering workers' compensation simply because they are "engaged in an occupation that by its very nature renders injury commonplace."⁶⁴ Indeed, there is only one case to date that has found that a professional football player cannot recover for injuries suffered in the course of employment due to the injuries not being classified as "accidental."⁶⁵ On the other hand, a plethora of cases have found that professional athletes, including football players, are eligible for workers' compensation.⁶⁶ Furthermore, some states statutorily prohibit the denial of coverage on the basis of the risk typically associated with the employment of the covered employee.⁶⁷

treatment" *Id.* at 504 (citing *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 75 P.2d 1058 (1938)).

63. See Michelle L. Modery, Comment, *Injury Time-Out: Justifying Workers' Compensation Awards to Retired Athletes with Concussion-Caused Dementia*, 84 TEMP. L. REV. 247, 256-57 (2011).

64. See *Pro-Football, Inc. v. Tupa*, 14 A.3d 678, 689 (2011), *cert. granted*, 21 A.3d 1063 (Md. June 17, 2011).

65. See *Palmer v. Kansas City Chiefs Football Club*, 621 S.W.2d 350 (Mo. Ct. App. 1981). A similar case, *Rowe v. Baltimore Colts*, 454 A.2d 872, 878 (1983), was overruled by the Court of Appeals of Maryland in 2012. See *Pro-Football v. Tupa*, 51 A.3d 544, 552 (Md. 2012) (quoting Professor Larson's criticism of "the kind of loose thinking" that characterizes sports injuries as not accidental: "[a]s a little reflection will show, this is tantamount to saying that the player in effect intended to get himself injured. This is, of course, preposterous. True, some of these sports are rough. But everything about them is elaborately designed to prevent actual disabling physical injury. All the forbidden practices—clipping, piling-on, face-masking, spearing, unnecessary roughness, and a host of others—are precisely intended to do everything possible to forestall injury . . ."). See also Professor Larson's criticism of *Palmer* in LARSON, *supra* note 7, § 22.04[1][b] (stating "[t]his decision is wrong. Just how conspicuously wrong can quickly be demonstrated by a check-list of four respects in which its wrongness makes it unique in the history of workers' compensation. (1) It is the only surviving appellate decision denying compensation for injury in a professional team sport. (2) It is the only case in history in which a class of employees has been told, first, that they are covered by the compensation act but, second, they are not protected when doing the very job they were hired to do. (3) It is the only case in compensation history in which unintended traumatic injuries have been held non-accidental. (4) It is the only category of employees as to whom the doctrine of assumption of risk has been reintroduced by the court, after having been deliberately ruled out by the legislature.").

66. See, e.g., *Pro-Football, Inc. v. D.C. Dept. Of Emp't Servs.*, 588 A.2d 275 (D.C. Cir. 1991); *Knelson v. Meadowlanders, Inc.*, 732 P.2d 808 (Kan. Ct. App. 1987); *Boden v. Detroit Lions, Inc.*, 483 N.W.2d 673 (Mich. Ct. App. 1992); *Brinkman v. Buffalo Bills Football Club*, 433 F.Supp. 699 (W.D.N.Y. 1977); *Pittsburgh Steelers Sports, Inc. v. Workmen's Comp. Appeal Bd.*, 604 A.2d 319 (Pa. Commw. Ct. 1992).

67. See MD. CODE ANN., LAB. & EMPL. § 9-507 (West 2012) (providing that "[c]ompensation may not be denied to a covered employee because of the degree of risk of the employment of the

Accordingly, a significant number of states have decided to specifically include professional athletes via statute. In these states, athletes are either expressly mentioned within the definition of “employee,” or they are included by virtue of endorsement by the Attorney General.⁶⁸ However, in light of the relatively high salaries of professional athletes, many of the states specifically choosing to include professional athletes also place limits upon the amount of compensation available.⁶⁹

In Florida, Massachusetts, and Wyoming, professional athletes are specifically excluded from workers’ compensation coverage. In 1983, three former Miami Dolphins football players challenged the Florida law on constitutional grounds.⁷⁰ The District Court of Appeal of Florida held that the exclusion of professional athletes did not violate the Equal Protection Clause of the Fourteenth Amendment.⁷¹ The court focused on the regular occurrence of serious injuries, the salaries of professional football players, and the players’ conscious decision to use their skills in a high-risk occupation in making its determination that the legislature’s exclusion of professional athletes was not wholly arbitrary in violation of the Fourteenth Amendment.⁷² Nevertheless, professional athletes employed within these three states are usually not left without a remedy. For example, Article 41, Section 1 of the NFL CBA provides:

In any state where workers’ compensation coverage is not compulsory or where a Club is excluded from a state’s workers’ compensation coverage,

covered employee.”).

68. See KAN. STAT. ANN. § 44-508(b) (2012); See also Modery, *supra* note 63, at 257–58 (citing Applicability of Indus. Ins. Act to Certain Athletes, Op. Att’y Gen. Wash. 5 (Feb. 14, 1984), available at <http://www.atg.wa.gov/AGOOpinions/opinion.aspx?section=topic&id=7566> (reasoning that all employees are covered under the statute unless specifically excluded and that Washington has no exclusionary provision)).

69. For example, in Pennsylvania and Michigan, athlete’s wages are capped at 200% of the state’s average weekly wage. See 77 PA. CONS. STAT. ANN. § 565 (West 2012); MICH. COMP. LAWS ANN. § 418.360 (2012). In the District of Columbia, workers’ compensation is based upon a calculation of the “professional athlete’s work life expectancy” by the Office of Workers’ Compensation. See D.C. CODE § 32-1501(17C). Thus, states may limit both the amount and duration of workers’ compensation benefits available to professional athletes. In addition to the limitations just discussed, there are a few other categories of treatment of professional athletes that deserve recognition. In West Virginia, the athlete’s employer may decide whether or not to subscribe to the state’s workers’ compensation system. See W. VA. CODE § 23-2-1(b)(6) (West 2012). In Texas, the athlete may elect to receive compensation from the state system or from the state included within his or her contract or collective bargaining agreement. See TEX. LAB. CODE ANN. § 406.095(a) (West 2011). Lastly, Missouri and Ohio have enacted “set-off” provisions, which reduce employee benefits in proportion to the contract benefits already paid to the injured athlete. See Stephen Cormac Carlin & Christopher M. Fairman, *Squeeze Play: Workers’ Compensation and the Professional Athlete*, 12 U. MIAMI ENT. & SPORTS L. REV. 95, 111 (1995).

70. *Rudolph v. Miami Dolphins, Ltd.*, 447 So. 2d 284, 288 (Fla. Dist. Ct. App. 1983).

71. *Id.* at 291–92.

72. *Id.*

a Club will either voluntarily obtain coverage under the compensation laws of that state or otherwise guarantee equivalent benefits to its players. In the event that a player qualifies for benefits under this section, such benefits will be equivalent to those benefits paid under the compensation law of the state in which his Club is located.⁷³

Lastly, in Kentucky, professional athletes who have been hired outside the Commonwealth by an employer domiciled in another state are exempted from receiving workers' compensation.⁷⁴ Interestingly, the Kentucky exemption covers employees that are temporarily employed within the Commonwealth, provided that the employer has purchased workers' compensation insurance coverage under the law of its state of domicile.⁷⁵ Thus, in Kentucky, the workers' compensation law of the foreign state provides the exclusive remedy for injured athletes.⁷⁶

V. FEDERAL PREEMPTION ISSUES AND THE ROLE OF AN NFL ARBITRATOR

This Part will begin by discussing the various federal preemption issues that arise when determining the scope of arbitration provisions contained within CBAs and employment contracts. Put differently, this Part will address when an arbitrator has the authority to render a decision regarding substantive rights afforded by statute. Then, it will discuss the NFL Arbitrator's limited role as an interpreter of the CBA or "contract reader," who determines only whether either party has breached the agreement.⁷⁷

A. Federal Preemption Issues

The majority of federal preemption disputes focus on whether or not the parties are required to arbitrate certain claims as well as the standards for overturning an arbitral award.⁷⁸ As a general rule, individual contracts are covered by the Federal Arbitration Act (FAA), while collective bargaining agreements (CBAs) are governed by the Labor Management Relations Act (LMRA).⁷⁹

73. NFL CBA, *supra* note 1, at 176. It should be noted that the CBA at issue in *Rudolph v. Miami Dolphins* contained a similar provision, which appears to have influenced the court's analysis to a certain degree. See *Rudolph*, 447 So. 2d at 290.

74. KY. REV. STAT. ANN. § 342.670(4) (West 2012).

75. *Id.*

76. *Id.*

77. See *Miami Dolphins, Ltd. v. Newson*, 783 F. Supp. 2d 769, 776 (W.D. Pa. 2011) (citing NFLPA/Harvey v. NFLMC/Buffalo Bills Arbitration (Feb. 14, 2007) (Das, Arb.)).

78. See *id.*

79. See *Int'l Chem. Workers Union v. Columbian Chems. Co.*, 331 F.3d 491, 494 (5th Cir. 2003).

The FAA establishes a national preference to arbitrate disputes between parties who have contracted to do so.⁸⁰ As such, when the parties agree to arbitrate all disputes arising under a contract, the arbitrator, not the courts, typically resolves the issues.⁸¹ However, the FAA is also concerned with assuring that agreements between private parties are enforced according to their terms.⁸² Thus, the FAA considers the wishes of the contracting parties⁸³ and “does not require [them] to arbitrate when they have not agreed to do so . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their agreement.”⁸⁴

The consequence of the FAA is that an agreement to arbitrate does not deprive a party of substantive rights afforded by statute.⁸⁵ Rather, the parties agree only to resolve the dispute in a different forum.⁸⁶ As articulated by the Supreme Court, the dispositive issue is “not whether the FAA preempts the [state statute] wholesale. The FAA plainly has no such destructive aim or effect. Instead, the question is simply *who* decides”⁸⁷

Section 301 of LMRA allows suits relating to “violation of contracts between an employer and a labor organization” to be brought within “any district court of the United States having jurisdiction [over] the parties”⁸⁸ as long as the labor organization represents employees in an “industry affecting commerce.”⁸⁹ Additionally, the suits may be brought irrespective of the amount in controversy or citizenship of the parties.⁹⁰

The majority of the Circuit Courts of Appeals have held that the LMRA, not the FAA, applies to CBAs. This approach developed after the Supreme Court stated that CBAs are not “contracts of employment,” a major area of FAA coverage.⁹¹ The Supreme Court emphasized that CBAs are not contracts of employment because “no one has a job by reason of [a CBA] and no obligation to any individual ordinarily comes

(“The LMRA applies to CBAs and the FAA applies to individual arbitration agreements.”).

80. *See* *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

81. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448–49 (2006).

82. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53–54 (1995); *Volt Info. Scis. v. Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

83. *Mastrobuono*, 514 U.S. at 57.

84. *Volt Info. Scis.*, 489 U.S. at 479.

85. *Gilmer v. Interstate*, 500 U.S. 20, 26 (1991).

86. *See id.*

87. *Preston v. Ferrer*, 552 U.S. 346, 352 (2008) (emphasis added) (internal citations omitted).

88. 29 U.S.C.A. § 185 (2012).

89. *Id.*

90. *Id.*

91. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334–35 (1944).

into existence from it alone.”⁹² Accordingly, the majority of circuits have determined that LMRA applies to CBAs, while the FAA may only be relied upon for guidance when reviewing an arbitration award.⁹³

Despite its refusal to recognize CBAs as contracts of employment, the Supreme Court has not been wholly hostile to arbitration provisions contained within CBAs.⁹⁴ Rather, the Court has stated that when an agreement has been collectively bargained in good faith and freely negotiated by the parties with respect to the items subject to mandatory bargaining under the National Labor Relations Act,⁹⁵ “the CBA’s arbitration provision must be honored unless the [statute] itself removes [a] particular class of grievances”⁹⁶ As the Court explained in *Gilmer v. Interstate*,⁹⁷ “[a]lthough all statutory claims may not be appropriate for arbitration, ‘[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.’”⁹⁸

The Supreme Court has also stated that a union-negotiated waiver of employees’ statutory rights must be “clear and unmistakable.”⁹⁹ Put differently, “the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA.”¹⁰⁰ As such, a general requirement to submit “all matters under dispute” to arbitration is insufficient.¹⁰¹ For such general language to be accepted, the statutes in question must be explicitly incorporated into the agreement.¹⁰²

Nevertheless, the Federal Courts of Appeals have different opinions as to what constitutes a clear and unmistakable waiver. The First Circuit has held that the lack of a statute’s explicit mention does not result in a

92. *Id.* at 335.

93. *E.g.*, *Int’l Chem. Workers Union v. Columbian Chems. Co.*, 331 F.3d 491, 494 (5th Cir. 2003); *Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 53 (2d Cir. 2001) (“We hold that in cases brought under Section 301 of the Labor Management Relations Act . . . the FAA does not apply.”); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir. 1996) (“[I]n this circuit, the FAA is not applicable to labor disputes arising from collective bargaining agreements.”).

94. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

95. *See* 29 U.S.C. § 159 (2012).

96. *14 Penn Plaza*, 556 U.S. at 248.

97. 500 U.S. 20 (1991).

98. *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

99. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998).

100. *Id.*

101. *Id.* at 80–81.

102. *See id.* at 80.

per se bar.¹⁰³ Similarly, the Fourth Circuit has stated that the employees' agreement to submit to arbitration "all . . . causes of action arising out of their employment" may be sufficient.¹⁰⁴ On the other hand, the Sixth and Ninth Circuits have taken much more stringent approaches. In the Sixth Circuit, "a statute must specifically be mentioned in a CBA for it to even approach *Wright's* 'clear and unmistakable' standard."¹⁰⁵ Similarly, the Ninth Circuit requires that a CBA expressly state which statutory claims are subject to arbitration.¹⁰⁶

B. The Role of an NFL Arbitrator

Although an agreement to arbitrate claims arising under a contract or CBA does not result in a forfeiture of statutory rights,¹⁰⁷ NFL arbitrators have shown a tendency to limit their role to that of a "contract reader" responsible for interpreting and applying the terms of the CBA or Player Contract rather than opining on "how the appropriate state authority should treat actions taken by the parties pursuant to state workers' compensation law."¹⁰⁸ Indeed, while Article 15, Section 1 of the NFL CBA lists the specific areas in which the System Arbitrator shall have exclusive jurisdiction,¹⁰⁹ Article 41, which is entitled "Workers' Compensation," is specifically excluded from that list. Thus, the combination of Article 15 and the approach typically adopted by NFL arbitrators suggests that the NFL and NFLPA did not "clearly and unmistakably" waive the right to a judicial forum in workers' compensation cases.¹¹⁰

103. *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 9 (1st Cir. 1999).

104. *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331–32 (4th Cir. 1999).

105. *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 631 (6th Cir. 1999).

106. *Doyle v. Raley's Inc.*, 158 F.3d 1012, 1015 (9th Cir. 1998).

107. *Gilmer v. Interstate*, 500 U.S. 20, 26 (1991).

108. *NFLPA/Harvey v. NFLMC/Buffalo Bills Arbitration* (Feb. 14, 2007) (Das, Arb.) (concluding that NFLPA was entitled to a declaration from the arbitrator on the meaning of contract provisions and that interpretation of "state workers' compensation laws is a matter to be decided in the appropriate state or federal forum, not arbitration under the CBA"). This approach is supported by Supreme Court precedent: the Court has noted that "[b]ecause the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights." *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981).

109. *NFL CBA*, *supra* note 1, at 113 ("Section 1. Appointment: The parties agree that the System Arbitrator shall have exclusive jurisdiction to enforce the terms of Articles 1, 4, 6-1 9, 26–28, 31, or 68–70 of this Agreement (except as provided in those Articles with respect to disputes determined by the Impartial Arbitrator, the Accountants, or another arbitrator).").

110. *See Miami Dolphins, Ltd.*, 783 F. Supp. 2d at 779 (citing *AFL/Tampa Bay Storm v. AFLPA/Brache & Daniels* (May 15, 2009) (observing that none of the agreements in question "clearly and unmistakably waives any right covered employees might have to file workers' compensation claims in states other than Florida" and "[a]bsent such clarity, any attempted waiver must fail")).

In one of the most recent arbitrations, Arbitrator Townley observed: “It is clear . . . that any interpretation of state workers’ compensation law is to be left to state or other authorities and not to the arbitrator, who is confined to the interpretation of the provisions of the CBA and the Players’ Contracts.”¹¹¹ Similarly, Arbitrator Das has repeatedly expressed his lack of authority to render decisions under state workers’ compensation law.¹¹² On the other hand, Das has also stated that “there is an issue as to whether a state tribunal is free to interpret a provision in the CBA . . . on its own without regard to [arbitrators or law of the shop].”¹¹³ In short, the arbitrator is only responsible for deciding whether a player breached his player contract by filing in a jurisdiction other than that which is listed in his contract.¹¹⁴ However, a court’s jurisdiction is not preempted while such contract interpretation arbitration proceeds.¹¹⁵

VI. RECENT NFL CASES

As discussed above, several choice-of-law and choice-of-forum cases involving NFL players have recently been decided on appeal at both the state and federal level. The typical NFL case begins when a player or group of players decide to file a workers’ compensation claim in California, despite contract language that provides otherwise.¹¹⁶ Subsequently, the club will respond by seeking an injunction or an arbitration decision that the players are in breach of contract.¹¹⁷ While it may not be possible to discern each individual player’s motivation for filing in California, there are two explanations that seem more plausible than others. First, the Supreme Court of California has stated that “workmen’s compensation statutes are to be construed liberally in favor

111. *Id.* at 776; *see also* *Chicago Bears v. Haynes*, 816 F. Supp. 2d 534, 537 (N.D. Ill. 2011).

112. *See Miami Dolphins, Ltd.*, 783 F. Supp. 2d at 776 (citing NFLPA/Harvey v. NFLMC/Buffalo Bills Arbitration (Feb. 14, 2007) (Das, Arb.); *Chicago Bears v. Haynes* (Apr. 21, 2011) (Townley, Arb.)). *See also* *Cincinnati Bengals, Inc. v. Abdullah*, No. 1:09-cv-738, 2010 WL 1857270 (S.D. Ohio Apr. 28, 2010).

113. *Miami Dolphins, Ltd.*, 783 F. Supp. 2d at 776 (citing NFLPA/Harvey v. NFLMC/Buffalo Bills Arbitration (Feb. 14, 2007) (Das, Arb.)).

114. *See id.* at 777–78.

115. *See id.* at 779 (citing *AFL/Tampa Bay Storm v. AFLPA/Brache & Daniels* (May 15, 2009) (observing that none of the agreements in question “clearly and unmistakably waives any right covered employees might have to file workers’ compensation claims in states other than Florida”); *Cincinnati Bengals, Inc. v. Abdullah*, No. 1:09-cv-738, 2010 WL 1857270, at *10–11 (S.D. Ohio Apr. 28, 2010).

116. *See, e.g., NFLMC/Tennessee Titans and NFLPA/Matthews Arbitration* (Aug. 5, 2010) (Sharpe, Arb.) (on file with author) [hereinafter *Titans & Matthews Arbitration*]; *NFL Players Ass’n v. NFL Mgmt. Council*, No. 10CV1671, 2011 WL 31068 (S.D. Cal. Jan. 5, 2011); *Pro-Football, Inc. v. Tupa*, 14 A.3d 678, 683 (2011), *cert. granted*, 21 A.3d 1063 (Md. June 17, 2011).

117. *See, e.g., Titans & Matthews Arbitration*, *supra* note 116; *NFL Players Ass’n v. NFL Mgmt. Council*, No. 10CV1671, 2011 WL 31068 (S.D. Cal. Jan. 5, 2011); *Tupa*, 14 A.3d at 683.

of awarding compensation.”¹¹⁸ Second, in 2001, the California Workers’ Compensation Appeals Board held that it had jurisdiction over a nonresident player’s claim for cumulative trauma despite the fact that his contract was neither negotiated nor executed in California.¹¹⁹

Accordingly, this Part will discuss the procedural history of recent cases.

A. Matthews v. Tennessee Titans

Before retiring in 2002, Bruce Matthews played 19 seasons for the Tennessee Titans and its predecessors the Tennessee Oilers and Houston Oilers.¹²⁰ Paragraph 26D of Matthews’ contract stated:

[Jurisdiction of all workers’ compensation claims and] all issues of law, issues of fact, and matters related to workers compensation benefits shall be exclusively determined by and exclusively decided in accordance with the internal laws of the State of Tennessee without resort to choice of law rules.¹²¹

In 2008, the Titans and the NFL Management Council (NFLMC) filed a non-injury grievance against Matthews protesting his pursuit of workers’ compensation in California.¹²² When the grievance request was refused, the parties submitted the dispute to arbitration. The issues to be arbitrated were as follows: First, did Bruce Matthews violate his Player Contract by filing a claim for workers’ compensation benefits in California and requesting that the claim be processed under California Law? Second, if Matthews did violate his Player Contract by filing in California, what is the appropriate remedy?¹²³

The Titans argued that Matthews’ Player Contract unambiguously required him to file his claims in Tennessee or Texas and that his breach could not be excused by an argument that the contract provision above

118. *Laeng v. Workmen’s Comp. Appeals Bd.*, 6 Cal. 3d 771, 778 (Cal. 1972).

119. *See* CAL LAB. CODE § 3600.5 (Deering 2012) (citing *Injured Workers’ Ins. Fund of Md. v. Workers’ Comp. Appeals Bd.*, 66 Cal. Comp. Cases 923 (Cal. App. 2001) (awarding compensation to a player for cumulative trauma based on injury he sustained during a single California football game while playing for the Baltimore Colts)). *But see* *Brown v. Cincinnati Bengals*, No. ADJ1220066 (Cal. W.C.A.B. Apr. 19, 2011) (on file with author) (reversing finding of jurisdiction over Bengals player employed by club from 1985–1992 who claimed to have sustained injuries arising out of and in the course of his employment to his head, neck, shoulders, elbows, wrists, hands, hips, back, spine, legs, knees, ankles, and feet. The judge found the player to have been only temporarily employed within the state of California in light of the fact that only 7 of his 150 career games were played within the state).

120. *See Titans & Matthews Arbitration*, *supra* note 116.

121. *NFL Players Ass’n v. NFL Mgmt. Council*, No. 10CV1671, 2011 WL 31068, at *1 (S.D. Cal. Jan. 5, 2011).

122. *See Titans & Matthews Arbitration*, *supra* note 116.

123. *Id.* at 2.

was a choice-of-law rather than a choice-of-forum provision.¹²⁴ The Titans also argued that his claim for benefits under California law made any distinction between the two irrelevant.¹²⁵ Next, the Titans attempted to distinguish the case from *Alaska Packers* by citing Matthews' residency and work in both Texas and Tennessee as evidence that he would not be without a remedy.¹²⁶ In short, the Titans argued "the Player's agreement is to forgo all forums except Tennessee and Texas, not to forgo the benefits [altogether]."¹²⁷ Lastly, the Titans argued that an arbitrator may issue a cease and desist order against a player who breaches his Player Contract by filing in an improper forum.¹²⁸

Conversely, Matthews argued that by filing in California, under California law, he did not breach his Player Contract.¹²⁹ In Matthews' view, Paragraph 26D was "at most a 'choice of law' clause" requiring the application of Tennessee workers' compensation law, which permits the filing of workers' compensation claims in other states.¹³⁰ Therefore, Matthews claimed that *Alaska Packers*, California public policy, and the California court's decision warranted the arbitrator's deference, and that such deference would also be consistent with past NFL arbitration decisions.¹³¹ Matthews then argued that *Alaska Packers* stands for the absolute standard that parties may not contract around applicable statutes.¹³²

Arbitrator Sharpe's opinion began by explaining that the central issue in the case was whether Paragraph 26D was a choice-of-forum clause or

124. *Id.* at 4.

125. *Id.*

126. *Id.* at 6.

127. *Id.*

128. *See id.* at 7 (citing arbitration precedent holding that a cease and desist order is appropriate where "a party's action under a state workers' compensation law contravenes the requirements in the CBA").

129. *Id.*

130. *Id.* *See also* *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U.S. 439 (1933) (employee filed and received compensation in Ohio under the Tennessee statute); *True v. Amerail Corp.*, 584 S.W. 2d. 794 (Tenn. 1979) (recovery in Virginia permissible and preclusive of recovery in Tennessee).

131. *See Titans & Matthews Arbitration*, *supra* note 116.

132. Matthews cited extensive authority in support of his argument. *See id.* at 7–10 (citing *Alaska Packers Ass'n v. California*, 294 U.S. 532 (1935) and *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939); *Metro. Life Ins. Co. v. Commonwealth of Mass.*, 471 U.S. 724 (1985) (finding that CBA cannot supersede state minimum health standards); *Livadas v. Bradshaw*, 512 U.S. 107 (1994) (state employee benefits not superseded by collectively bargained benefits under the preemption doctrine); *Contract Servs. Network, Inc. v. Aubry*, 62 F.3d 294 (9th Cir. 1995) (workers' compensation benefits formula under a collective bargaining agreement did not preempt the California Workers Compensation Statute); *Brache v. Tampa Bay Storm*, 2010 Cal. Wrk. Comp. P.D. LEXIS 339 (Cal. Wrk. Comp. P.D. Aug. 26, 2010) (player injured in California did not waive benefits under California law despite CBA that purported to waive benefits outside of Florida). *See also supra* text accompanying notes 38–62.

a choice-of-law clause. Sharpe explained that the former would prevent Matthews from filing a claim in California while the latter would only require the application of Tennessee law and would not imply a selection of forum.¹³³ After acknowledging the difficulties associated with the drafting and interpretation of forum clauses, Sharpe noted the “awkwardness” of the use of the term “jurisdiction” within Paragraph 26D.¹³⁴ Consequently, Sharpe noted Tennessee law does not claim exclusive jurisdiction for workers’ compensation claims and that jurisdiction is one of many issues to be decided by and in accordance with Tennessee law.¹³⁵

Nonetheless, Sharpe emphasized his role as a “contract reader” and concluded that Paragraph 26D was a “mutual obligation” provision, requiring both the player and team to assure the application of Tennessee law.¹³⁶ As such, he found that Matthews’ filing for California benefits in California was a breach of the contract.¹³⁷ Finally, Sharpe instructed the parties to stipulate to the application of Tennessee law before the California tribunals.¹³⁸ He then stated that a refusal to accept such stipulation by the tribunals would require the parties withdraw, thereby foreclosing any further relief in California.¹³⁹

Following the arbitration decision, the NFLPA made a motion on Matthews’ behalf to vacate the arbitration award in U.S. District Court in the Southern District of California.¹⁴⁰ The court began its analysis by stating the four instances in which it may vacate an arbitration award under § 301 of the LMRA:

- (1) when the award does not draw its essence from the collective bargaining agreement and the arbitrator is dispensing his own brand of industrial justice;
- (2) where the arbitrator exceeds the boundaries of the issues submitted to him;
- (3) when the award is contrary to public policy; or

133. See *Titans & Matthews Arbitration*, *supra* note 116, at 10–11.

134. *Id.* at 12.

135. *Id.* Sharpe noted Matthews’ citations to other cases allowing the application of Tennessee law in other forums.

136. *Id.* at 14–15.

137. *Id.* at 15.

138. *Id.*

139. *Id.*

140. The NFLPA made “three arguments for overturning the arbitration award. First . . . that the award is contrary to California law and public policy. Second . . . that the award is contrary to federal labor law. And finally . . . that the award violates the Full Faith and Credit Clause.” *NFL Players Ass’n v. NFL Mgmt. Council*, No. 10CV1671, 2011 WL 31068, at *3 (S.D. Cal. Jan. 5, 2011). The NFLMC and the Titans countered with a motion to confirm the arbitration award.

(4) when the award is procured by fraud.¹⁴¹

Additionally, the court “assume[d], without deciding, that the ‘manifest disregard of the law’ basis for vacatur” under the FAA was also available in § 301 actions.¹⁴² The court then stated that whether the arbitrator manifestly disregarded the law and whether the award was contrary to public policy were the only two bases under which it would consider vacatur.¹⁴³ Lastly, the court noted that its review was “limited and deferential” and that the court “does not sit to hear claims of factual or legal error.”¹⁴⁴

In light of its limited and deferential review, the court concluded that arbitrator Sharpe did not manifestly disregard the Full Faith and Credit Clause by failing to address the same in his ruling against Matthews.¹⁴⁵ Rather, the court noted that Matthews failed to “show the arbitrator understood and correctly stated the law, but proceeded to disregard the same.”¹⁴⁶

Next, the court explained the “contrary to public policy” standard applies only to those policies that are “explicit, well-defined, and dominant”¹⁴⁷ while also providing a “reference to the laws and legal precedents [rather than] general considerations”¹⁴⁸ Additionally, the party seeking vacatur has the burden of showing that the policy specifically militates against the arbitrator’s award.¹⁴⁹ Ultimately, the court noted that it was not in a position to determine Matthews’ eligibility for California workers’ compensation and held that California law, the Full Faith and Credit Clause, and federal law, as argued by Matthews, did not constitute explicit, well-defined, and dominant public policy sufficient to result in vacatur of the arbitrator’s award.¹⁵⁰ Consequently, Matthews filed an appeal in the Ninth Circuit Court of Appeals.

In considering Matthews’ request to “vacate an arbitration award that prohibits him from pursuing workers’ compensation benefits under California law,” the Ninth Circuit Court of Appeals held that Matthews had not alleged sufficient contacts with the state of California and therefore had not met his burden of demonstrating that the award

141. *Id.* at *2.

142. *Id.*

143. *Id.* at *3.

144. *Id.* at *2.

145. *Id.* at *3.

146. *Id.*

147. *Id.*

148. *Id.* (citing *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987)).

149. *Id.*

150. *Id.* at *7–8.

deprived him of something he was entitled to under state law.¹⁵¹ The Ninth Circuit also stated that Matthews had not shown a violation of federal labor policy or that the arbitrator manifestly disregarded the Full Faith and Credit Clause.¹⁵² The crux of the Ninth Circuit's opinion focused on the fact that when Matthews filed for workers' compensation in 2008 he claimed only that his injuries were the result of his being "employed by the NFL at 'various' locations over 19 years"¹⁵³ The court criticized Matthews for using the "'various' locations" language in his 2008 application for workers' compensation, for his failure to allege that he had played football in California or that he suffered any discrete injury in California, and for his argument in briefing—without citation to the record—that he was injured in California.¹⁵⁴ The Ninth Circuit then noted that while Matthews may be correct that nearly every game contributed to his cumulative injuries, it is not clear, as a matter of California law, that this would allow him to qualify for California workers' compensation benefits.¹⁵⁵

In short, the Ninth Circuit declined to interpret California's policy and the Supreme Court's decision in *Alaska Packers* as guaranteeing a universal right to seek California workers' compensation benefits.¹⁵⁶ Rather, under the Ninth Circuit's interpretation, the California workers' compensation statute establishes the rule that employees who are "otherwise eligible for California benefits cannot be deemed to have contractually waived those benefits"¹⁵⁷ Nonetheless, the Ninth Circuit went on to explain:

To be precise, we do not hold that employers may use binding arbitration of choice-of-law clauses as a means to evade California law where it would otherwise apply. Nor must an employee challenging an arbitration award show that he necessarily would prevail on his workers' compensation claim before a California tribunal. An employee who makes a prima facie showing that his claim falls within the scope of California's workers' compensation regime may indeed be able to establish that an arbitration award prohibiting him from seeking such benefits violates California policy. Matthews did not do so here because he did not allege facts showing an injury in California or any burden on the state's medical system, and it is not clear that California would extend its workers' compensation regime to cover the cumulative injuries

151. *Matthews v. NFL Mgmt. Council*, 688 F.3d 1107, 1110 (9th Cir. 2012).

152. *Id.*

153. *Id.*

154. *Id.* at 1113-14. Nonetheless, the Ninth Circuit did take judicial notice that Matthews played 13 games in California during his 19 year career.

155. *Id.*

156. *Matthews*, 688 F.3d at 1111.

157. *Id.*

Matthews claims, given his limited contacts with the state.¹⁵⁸

Similarly, in rejecting Matthews' manifest disregard arguments, the Ninth Circuit stated that because Matthews had failed to show that the "Full Faith and Credit Clause guarantees California's right to apply its law *on the facts of this case*, he [did not establish] that the arbitrator recognized yet chose to ignore 'well defined, explicit, and clearly applicable' law."¹⁵⁹

B. Chicago Bears v. Haynes

In 2009 and 2010, three former Chicago Bears players filed claims for workers' compensation benefits before the California Workers' Compensation Appeals Board seeking benefits under California law.¹⁶⁰ The Bears, along with the NFL Management Council, responded by filing grievances to be heard before Arbitrator Rosemary Townley, who concluded that the language of the player contracts contained both choice-of-law and choice-of-forum provisions which required that all workers' compensation claims be brought before the Illinois Workers' Compensation Commission and adjudicated pursuant to Illinois law.¹⁶¹ In so concluding, Arbitrator Townley found the *Matthews* decision to have preclusive effect under the "law of the shop."¹⁶² Further, she found that the players breached the forum selection clauses of their Player Contracts by filing in California and proceeded to issue a cease and desist order.¹⁶³ Arbitrator Townley supported her conclusions by emphasizing that the Bears are located in Illinois, the contracts were executed and substantially performed in Illinois, and that the parties had freely negotiated the choice-of-law and choice-of-forum provisions.¹⁶⁴ Unhappy with the result, the players filed an appeal in the United States District Court for the Northern District of Illinois.¹⁶⁵

On appeal, the court emphasized an NFL arbitrator's limited role as a contract reader, as well as the general rule that parties who submit to binding arbitration must abide by the result.¹⁶⁶ However, the court also explained that it is allowed to consider *de novo* whether the arbitrator's

158. *Id.* at 1114.

159. *Id.* at 1116-17.

160. *Chicago Bears v. Haynes*, 816 F. Supp. 2d 534, 535 (N.D. Ill. 2011).

161. *See id.* at 536 (citing *Chicago Bears v. Haynes* (Apr. 21, 2011) (Townley, Arb.)).

162. *See id.*

163. *Id.*

164. *See id.* at 538.

165. *Id.* at 535.

166. *Id.* at 537 (citing *Miami Dolphins, Ltd. v. Newson*, 783 F.Supp.2d 769, 774-76 (W.D. Pa. 2011)).

award is contrary to well defined and dominant public policy.¹⁶⁷ The court went on to briefly summarize the “numerous pages” which each side had devoted to making California public policy arguments, which focused mainly on *Alaska Packers*, before criticizing both parties for failing to address the “obvious threshold question: *why is California’s public policy relevant at all?*”¹⁶⁸ The court concluded by reiterating that a state must have a significant contact or aggregation of contacts in order to prevent the arbitrary and fundamentally unfair application of its laws.¹⁶⁹ Nonetheless, the players have filed an appeal in the Seventh Circuit Court of Appeals.¹⁷⁰

C. Pro-Football, Inc. v. Tupa

Thomas Tupa was employed as a punter for the Washington Redskins (Redskins) from 2004 until 2006.¹⁷¹ Tupa suffered a career-ending injury to his back while warming up for a Redskins preseason game in 2005.¹⁷² Subsequently, Tupa filed a claim with the Maryland Workers’ Compensation Commission, which was contested by the Redskins, *inter alia*, for lack of jurisdiction.¹⁷³ The Redskins based their jurisdictional arguments on the forum selection clause of Tupa’s contract, which contained the following provision:

JURISDICTION. The parties hereto agree that this Player Contract shall for all purposes be deemed to have been negotiated and executed in Virginia; that should any dispute, claim or cause of action (collectively “dispute”) arise concerning rights or liabilities arising from the relationship between the Player and the Club, the parties hereto agree that the law governing such dispute shall be the law of the Commonwealth of Virginia, and that the exclusive jurisdiction for resolving such dispute in the case of Workers’ Compensation is the Virginia Workers’ Compensation Commission, and in the case of Workers’ Compensation claims the Virginia Workers’ Compensation Act shall govern.¹⁷⁴

Despite this provision, the Maryland Workers’ Compensation Commission found that Maryland, not Virginia, had jurisdiction over the

167. *Id.* (citing *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983)).

168. *Id.* at 538.

169. *Id.* at 541 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312 (1981)).

170. *See NFL Workers’ Compensation Court Cases*, SPORTS BUS. DAILY (Jan. 23, 2012), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/01/23/Labor-and-Agents/Workers-comp-cases.aspx>.

171. *Pro-Football, Inc. v. Tupa*, 14 A.3d 678, 679 (2011), *cert. granted*, 21 A.3d 1063 (Md. June 17, 2011).

172. *See id.*

173. *Id.*

174. *Id.* at 684.

claim.¹⁷⁵ On review, the court emphasized that Tupa's injury occurred while he was working in Maryland and that he was expected to play eight regular season games and two preseason games in Maryland each season.¹⁷⁶ Additionally, the court emphasized that the Redskins were incorporated in Maryland, that the Redskins' home games were played in Maryland, and that the incident occurred at FedEx field in Landover, Maryland.¹⁷⁷ By doing so, the court was able to refute the Redskins' argument that the location of the Redskins practice facility in Virginia along with the contractual provision above would lead to the conclusion that Tupa was employed primarily in Virginia and only temporarily in Maryland.¹⁷⁸

Similarly, the court stated that although Tupa was hired in Virginia, the "purpose of his employment was to play professional football at FedEx Field in Maryland and at various other stadiums around the country."¹⁷⁹ Likewise, the court found that the purpose of Tupa's employment also superseded his spending the majority of his time as an employee at the Redskins' Virginia practice facility.¹⁸⁰ In so finding, the court emphasized that the jurisdictional inquiry requires more than a simple tallying of time in each jurisdiction.¹⁸¹

Lastly, the court discussed the Supreme Court's observation that there is "a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions."¹⁸² However, the court noted that the presumption that a choice-of-forum clause is valid and enforceable is rebuttable if the resisting party demonstrates that it unreasonably contravenes a strong public policy of the state where the action is filed.¹⁸³ Here, the Maryland statute provides:

- [A] covered employee or an employer of a covered employee may not by agreement, rule, or regulation:
- (i) exempt the covered employee or the employer from a duty of the covered employee or the employer under this title; or
 - (ii) waive a right of the covered employee or the employer under this

175. *Id.* at 680.

176. *Id.* at 682.

177. *Id.* at 683.

178. *Id.* at 682–83.

179. *Id.* at 683.

180. *Id.* at 683–84.

181. *Id.* at 683. Thus, the court was also able to refute the Redskins' argument that Tupa was excluded from coverage under MD. CODE ANN. LAB. & EMPL. § 9-203(b)(1) (West 2012), which provides, in relevant part: "An individual is not a covered employee while working in this State for an employer only intermittently or temporarily if: (i) the individual and employer make a contract of hire in another state" *Id.* at 682.

182. *Id.* at 684 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985) (internal citations omitted)).

183. *See id.* at 685.

title.¹⁸⁴

Accordingly, the court noted that any agreement violating this provision is void under state law.¹⁸⁵ After finding that Tupa was a covered employee, and implying that the Redskins were a covered employer,¹⁸⁶ the court went on to cite Professor Larson's contention that "the overriding consideration [is] that compensation is not a private matter to be arranged between two parties; the public has a profound interest in the matter which cannot be altered by any individual agreements"¹⁸⁷ and noted that many other states share this view as being consistent with *Alaska Packers*.¹⁸⁸

The Redskins appealed to the Court of Appeals of Maryland, which affirmed the lower court's decision on August 22, 2012.¹⁸⁹ The Court of Appeals of Maryland emphasized that the Maryland statute, in plain, unambiguous language, precluded agreements that purport to exempt employers from workers' compensation liability as well as those that waive an employee's rights to receive benefits.¹⁹⁰ The Court of Appeals explained that allowing forum selection clauses to constitute an exception to the Maryland statute would contravene basic statutory interpretation principles and "would be to re-draft the statute under the guise of construction."¹⁹¹ Lastly, the Court of Appeals cited "numerous cases in other states that have also refused to give effect to forum selection clauses in workers' compensation cases."¹⁹²

VII. ANALYSIS

As the previous Parts illustrate, courts have adopted relatively inconsistent approaches regarding choice-of-law and choice-of-forum provisions. Further, this inconsistency seems to be exacerbated by the

184. *Id.* (citing MD. CODE ANN. LAB. & EMPL. § 9-104(a)(1) (West 2012)).

185. *See* MD. CODE ANN. LAB. & EMPL. § 9-104(a)(2).

186. *Pro-Football, Inc. v. Tupa*, 14 A.3d 678, 682–85 (2011), *cert. granted*, 21 A.3d 1063 (Md. June 17, 2011).

187. *Id.* at 685 (citing 1 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION § 143.07 (2010)).

188. *Id.* at 686, n.7 (citing *Hartford Accident & Indem. Co. v. Welker*, 75 Ga. App. 594, 597 (1947); *Miller v. Hirschbach Motor Lines, Inc.*, 714 S.W.2d 652, 655–56 (Mo. App. 1986); *Gotkin v. Weinberg*, 2 N.J. 305, 308 (1949); *Giltner v. Commodore Contract Carriers*, 14 Or. App. 340, 344–45 (1973); *Robert M. Neff v. Workmen's Comp. App. Bd.*, 155 Pa. Cmwlth. 44 (1993); *Jenkins v. Sal Chem. Co.*, 167 W. Va. 616, 618 (1981)).

189. *Pro-Football v. Tupa*, 51 A.3d 544 (Md. 2012).

190. *Id.* at 549.

191. *Id.* (citing *Montrose Christian School v. Walsh*, 770 A.2d 111 (Md. 2001)(quoting *Davis v. State*, 451 A.2d 107, 111)).

192. *Id.* at 550 (citing *Swenson v. Nickaboine*, 793 N.W.2d 738, 743 (Minn. 2011); *Gotkin v. Weinberg*, 66 A.2d 438, 439 (NJ 1949); *McIlvaine Trucking, Inc. v. Workers' Comp. App. Bd.*, 810 A.2d 1280, 1286 (Pa. 2002); *Jenkins v. Sal Chem. Co.*, 280 S.E.2d 243 (W.Va. 1981)).

presence of an arbitration clause. Though not readily apparent, these variations may be attributable to a few fundamental, but facially inconsistent principles articulated by the Supreme Court. First, the Court has stated that an agreement to arbitrate does not deprive a party of substantive rights afforded by statute.¹⁹³ However, the Court has also stated that an arbitrator may issue a decision that is inimical to public policy in an effort to effectuate the intent of the parties.¹⁹⁴ Lastly, the Supreme Court has stated emphatically that state legislation “cannot be condemned because it curtails the power of the individual to contract.”¹⁹⁵

Reading these three principles collectively, it appears that more weight should be given to the fact that an agreement to arbitrate does not amount to a forfeiture of statutory rights, which in and of themselves cannot be condemned for reducing the power of an individual to contract. As such, an arbitrator’s power to issue a decision that is inimical to statutory rights, insofar as workers’ compensation is concerned, is better classified as permissive rather than final or binding, and should therefore be used sparingly. Thus, in certain situations an arbitrator’s decision should be reviewed *de novo*. With this in mind, this Part will analyze each of the cases discussed in Part VI.

A. Tennessee Titans v. Matthews

In failing to vacate Arbitrator Sharpe’s award, the U.S. District Court in the Southern District of California permitted Sharpe to engage in the classic exercise of rendering a decision and then subsequently attempting to find authority to support it. Additionally, the court itself gave no reasoning for considering only the public policy vacatur factor under § 301 of the LMRA and confusingly assumed without deciding that the manifest disregard of the law basis for vacatur was available under § 301.¹⁹⁶ As demonstrated in Part VI(A) *supra*, the lengthy discussion of Paragraph 26D of Matthews’ NFL Player Contract rather than the NFL CBA should have alerted the court that the FAA was applicable.

In finding as he did, Arbitrator Sharpe essentially held that the

193. *Gilmer v. Interstate*, 500 U.S. 20, 26 (1991).

194. *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981).

195. *Alaska Packers Ass’n v. California*, 294 U.S. 532, 543 (1935) (citing *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 157–58 (1931)).

196. *See NFL Players Ass’n v. NFL Mgmt. Council*, 2011 WL 31068, No. 10CV1671, at *2 (S.D. Cal. Jan. 5, 2011). Thus, we are left to assume that the award draws its essence from the collective bargaining agreement, that the arbitrator is not dispensing his own brand of industrial justice, that the arbitrator has not exceeded the boundaries of the issues submitted to him, and that the award was not procured by fraud.

Player's agreement is to forgo all benefits except those available in Tennessee and Texas, not to forgo the benefits altogether.¹⁹⁷ This holding is problematic and contrary to significant legal precedent. Indeed, the employer in *Alaska Packers* was implicitly arguing that the employees were forgoing all benefits except those available in Alaska, not forgoing their benefits altogether.¹⁹⁸ Furthermore, after acknowledging "the possibility that a California tribunal may choose to apply California law,"¹⁹⁹ Sharpe required the parties to proceed under Tennessee law and promised the issuance of a cease and desist order if the California tribunals decided otherwise.²⁰⁰ Here, Sharpe noted that although the "Player's Contract does not control California's application of its own law; it does control the conduct of the parties."²⁰¹ As such, Sharpe failed to consider the Full Faith and Credit Clause and thereby deprived the California courts of the opportunity to consider and balance the government interests of each state in reaching a decision.²⁰² Thus, Sharpe effectively prevented California from "enforc[ing] in its own courts its own statutes, lawfully enacted."²⁰³

Additionally, the district court's acceptance of Sharpe's decision places a nearly insurmountable burden upon Matthews to demonstrate that Sharpe manifestly disregarded the law. The court acknowledged Matthews' argument that under *Alaska Packers* California "'had a legitimate public interest in controlling and regulating this employer–employee relationship' and it would not violate due process to apply § 5000's ban on contracts waiving California workers' compensation."²⁰⁴ The court also noted that *Alaska Packers* had been favorably cited more than seventy years after being decided.²⁰⁵ Nonetheless, the court held that Matthews failed to "show the arbitrator understood and correctly stated the law, but proceeded to disregard the same," despite Sharpe's express discussion of "four Supreme Court cases . . . a Ninth Circuit case . . . a professional football case . . . and a California Workers' Compensation Judge's decision" in support of Matthews' position.²⁰⁶ In finding as it did, the district court confusingly

197. See *Titans & Matthews Arbitration*, *supra* note 116, at 6, 18.

198. See generally *Alaska Packers Ass'n v. California*, 294 U.S. 532 (1935).

199. *Titans & Matthews Arbitration*, *supra* note 116, at 15.

200. *Id.* at 18.

201. *Id.* at 14.

202. See *Alaska Packers*, 294 U.S. at 542.

203. *Id.* at 547.

204. *NFL Players Ass'n v. NFL Mgmt. Council*, No. 10CV1671, 2011 WL 31068, at *4 (S.D. Cal. Jan. 5, 2011) (citing *Alaska Packers*, 294 U.S. at 539).

205. *Id.* at *5 (citing *Bowen v. Workers' Comp. Appeals Bd.*, 73 Cal. App. 4th 15 (1999)).

206. *Id.* at *3 (citing *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007)); *Titans & Matthews Arbitration*, *supra* note 116, at 9–10.

held that Matthews had not outlined an explicit, well-defined, dominant public policy,²⁰⁷ despite recognizing Supreme Court precedent that found California to have a legitimate public interest at stake.²⁰⁸

The holding by the Ninth Circuit Court of Appeals is similarly confusing. As discussed above, the Ninth Circuit began by criticizing Matthews' failure to demonstrate significant contact with California.²⁰⁹ Later in the opinion, Matthews was criticized for making such an argument without citation to the record.²¹⁰ Subsequently, the Ninth Circuit attempted to soften the blow by stating that an employee does not have to show that he would prevail on his workers' compensation claim before a California tribunal, but only that his claim falls within the scope of California's workers' compensation regime.²¹¹

The Ninth Circuit's approach is problematic for two reasons. First, the Ninth Circuit was asked to review the arbitration award, not Matthews' workers' compensation filings. Second, the Ninth Circuit failed to recognize the significance of Arbitrator Sharpe's order that the parties cease and desist from persuading the California tribunals to apply California law.²¹² These problems will be discussed below.

The Ninth Circuit's continued focus on Matthews' insignificant contacts with California is drastically different from the analysis contained in the arbitration award and the district court opinion. Indeed, the Ninth Circuit opinion seems to ignore the arbitral award altogether. As discussed in Parts V and VI *supra*, NFL arbitrators serve only as contract readers and do not render workers' compensation decisions.²¹³ Thus, there was no reason for Matthews to provide Arbitrator Sharpe with information regarding his injuries in California. Additionally, had Matthews done so, Sharpe could not possibly determine, as the Ninth Circuit seems to advocate, whether Matthews had alleged specific facts to fall within the scope of California's workers' compensation regime without performing at least some analysis of the California statute itself. As such, the Ninth Circuit's repeated criticism of Matthews' submissions appears misguided. The lower court refused to engage in an analysis of Matthews' eligibility for workers' compensation. Thus, had Matthews attempted to demonstrate to the Ninth Circuit that he had significant contacts with California, he likely would have been criticized for raising an issue on appeal that had not been raised below.

207. *NFL Players*, 2011 WL 31068, at * 5.

208. *Id.* at *4 (citing *Alaska Packers*, 294 U.S. 532).

209. *See Matthews v. NFL Mgmt. Council*, 688 F.3d 1107, 1110 (9th Cir. 2012).

210. *Id.* at 1113-14.

211. *Id.*

212. *See Titans & Matthews Arbitration*, *supra* note 116 at 15.

213. *See Miami Dolphins, Ltd. v. Newson*, 783 F. Supp. 2d 769, 776 (W.D. Pa. 2011).

As for the Ninth Circuit's treatment of the cease and desist order, it ignores the fact that workers' compensation claims are informal and need only identify the claimant, indicate that a compensable injury has occurred, and convey the idea that compensation is expected.²¹⁴ Similarly, this liberality extends to the amendment of pleadings and generally includes amendments to correct defects such as vagueness, omission of essential facts, or inaccuracy in the description of the injury.²¹⁵ Given the Titans' decision to seek arbitration against Matthews after he filed in California, the claim requirements were likely satisfied. Additionally, notwithstanding the Ninth Circuit's criticism of Matthews' statement that he was injured at "'various' locations over 19 years," it seems as though he could correct this statement on account of its vagueness and omission of essential facts. Accordingly, by upholding the arbitration award, the Ninth Circuit improperly deprived Matthews of any real opportunity to demonstrate that he was otherwise eligible for California benefits. In light of the inconsistencies just discussed, the Ninth Circuit Court of Appeals should have reviewed Sharpe's decision *de novo*. In doing so, the Ninth Circuit should have found that Sharpe's decision was contrary to well-defined public policy. As such, the Ninth Circuit should have remanded the case and directed the workers' compensation tribunal to independently determine whether California Labor Code § 5000 rightfully overrides Matthews' contract provision requiring the application of Tennessee law.²¹⁶ Indeed, as mentioned above, Arbitrator Sharpe himself recognized the possibility that a California tribunal may choose to apply California law.²¹⁷

B. Chicago Bears v. Haynes

Upon review, the Seventh Circuit Court of Appeals will likely share District Judge Bucklo's curiosity as to why the public policy of California is relevant in this dispute.²¹⁸ Equally confusing is the players' decision to file their claims in California when Illinois law recognizes cumulative trauma.²¹⁹ Notwithstanding this potential confusion, the Seventh Circuit should remand the case to the California

214. LARSON, *supra* note 7, § 124.04.

215. *Id.* (citations omitted).

216. See NFL Players Ass'n v. NFL Mgmt. Council, No. 10CV1671, 2011 WL 31068, at *5–6 (S.D. Cal. Jan. 5, 2011) (citing *Alaska Packers*, 294 U.S. at 539).

217. *Titans & Matthews Arbitration*, *supra* note 116, at 15.

218. See *Chicago Bears v. Haynes*, 816 F. Supp. 2d 534, 538 (N.D. Ill. 2011).

219. See 26 ILLINOIS JURISPRUDENCE, WORKERS' COMPENSATION § 5:76 (stating "[i]n repetitive trauma claims, the employee must meet the same standards of proof as any other claim. The employee must establish (1) when the injury manifested itself and (2) that a causal connection exists between the cumulative trauma and the eventual breakdown of the employee's physical structure.").

workers' compensation tribunals for the same reasons articulated in Part VII(A). As such, the California workers' compensation tribunals should determine whether or not the players' are entitled to California workers' compensation benefits.

The Seventh Circuit should also point out that Judge Bucklo's opinion contains a few troubling passages. First, the court implicitly approved of Arbitrator Townley's decision to give the *Matthews* decision "preclusive effect," despite the generally accepted premise that arbitral awards have no value as precedent in future disputes²²⁰ as well as the fact that the *Matthews* provision was found to be only a choice-of-law clause.²²¹ Secondly, assuming, *arguendo*, that the *Matthews* decision could be used as precedent, footnote 5 of the *Matthews* decision contains a specific example of what Arbitrator Sharpe determined to be a "clearly drafted choice-of-forum clause"; however, that provision is significantly different from those contained in the contracts signed by the Bears players.²²²

Thus, when remanding the case, it would be wise for the Seventh Circuit to emphasize the limited precedential value of arbitral awards as well as to reiterate that the validity of choice-of-law and forum provisions should be evaluated on a case-by-case basis in accordance with the appropriate state policy.

C. Pro-Football, Inc. v. Tupa

While the Maryland Workers' Compensation Commission gave several reasons to support a finding for Tupa, the Commission could

220. W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1092 (2012).

221. *Chicago Bears*, 816 F. Supp. 2d at 536.

222. *Compare Titans & Matthews Arbitration*, *supra* note 116, at 12 (citing Addendum No. 3 of the Player Contract between Khalid Abdullah and the Cincinnati Bengals, Inc., which reads, in part: "Player further agrees that any claim, filing, petition, or cause of action in any way relating to workers' compensation rights or benefits arising out of Player's employment with the Club, including without limitation the applicability or enforceability of this addendum shall be brought solely and exclusively with the courts of Ohio, the Industrial Commission of Ohio, or such other Ohio tribunal that has jurisdiction over the matter."), *with* Plaintiffs' Opening Brief in Support of Motion to Confirm Arbitration Award, *Chicago Bears v. Haynes*, 816 F. Supp. 2d 534 (N.D. Ill. 2011) (No. 11CV02668) (noting that the Players' Employment Contracts with the Bears stated in relevant part "[s]hould any dispute, claim or cause of action arise concerning rights or liabilities arising from the relationship between the Player and the Club, the parties hereto agree that the law governing such dispute shall be the law of the State of Illinois. Furthermore, the exclusive jurisdiction for resolving injury related claims shall be the Illinois Industrial Commission of the State of Illinois, and in the case of Workers Compensation claims the Illinois Workers Compensation Act shall govern."). It is likely that the significant difference between these two passages is the Bengals' insertion of the "without limitation the applicability or enforceability of this addendum . . ." language. Otherwise, the clauses are relatively similar.

have limited its findings to the fact that Tupa was injured in the course of his employment within the state of Maryland and was thereby eligible for workers' compensation.²²³ As discussed above, because an in-state injury can never be excluded from coverage,²²⁴ the Court of Appeals of Maryland was wise to affirm the decision.²²⁵

Despite being decided in Maryland rather than California, the *Tupa* case is an interesting one because it tends to support certain views that are generally adopted by the NFL and by the NFLPA. First, the lower court's "purpose of employment" discussion is likely to assist most teams whose home games are played in the same state as that which is included in the forum selection clause.²²⁶ However, this discussion would also be likely to support players having contracts similar to Tupa's (i.e., the choice-of-law and choice-of-forum provisions of the players' contracts provide for a state other than that in which they play their home games).²²⁷ Second, both opinions suggest that cumulative trauma leading to acute injury could result in an award of full compensation within the state of the acute injury, which would certainly favor the player.²²⁸ Third, and perhaps most importantly, both opinions support Professor Larson's (and the NFLPA's) contention that any agreement, even an NFL CBA or Player Contract, is void and ineffective to the extent that it contravenes state policy.²²⁹ Lastly, the lower court's explanation that "the inquiry requires more than simply tallying up the quantity of time the employee spends in each jurisdiction" is quite malleable and could easily support the position of

223. See *Pro-Football, Inc. v. Tupa*, 14 A.3d 678, 682 (2011), *cert. granted*, 21 A.3d 1063 (Md. June 17, 2011) (noting that "[i]t is undisputed that Tupa's injury occurred while he was working at FedEx Field in Landover").

224. LARSON, *supra* note 7, § 143.01.

225. Furthermore, it is possible that Tupa would have been left without a remedy if the Maryland court had declined to exercise jurisdiction. As discussed above, Virginia requires that "the place of contract and the employer's place of business are both within the state" and does not allow coverage at all if "the contract is for services exclusively outside the state." *Id.* As the court noted, the Redskins' principal place of business, FedEx Field, is located in Landover, MD. Furthermore, because Virginia does not have a professional football team, it would appear as though the purpose of Tupa's employment was to perform services exclusively outside of the state.

226. See *Tupa*, 14 A.3d at 683–84. The Redskins do not benefit in this regard as FedEx Field is located just across the Virginia and Maryland border.

227. For example, like FedEx Field, which is located just across the Maryland border, the Edward Jones Dome, which is the home of St. Louis Rams, is located just across the border from Missouri. Similarly, both the New York Giants and New York Jets play at MetLife Stadium, which is located in East Rutherford, New Jersey. It certainly seems possible that these teams may have signed, or may have considered signing players to contracts with clauses similar to Tupa's at some point.

228. See *Tupa*, 14 A.3d at 691 (noting that the "jury needed only to find that the accidental injury contributed to the disability, not that it was the sole cause."); see also *Injured Workers' Ins. Fund of Md. v. Workers' Comp. Appeals Bd.*, 66 Cal. Comp. Cases 923 (Cal. App. 2001).

229. See *id.* (citing LEX K. LARSON, LARSON'S WORKERS' COMPENSATION § 143.07 (2010)). See also *Brache v. Tampa Bay Storm*, 2010 Cal. Wrk. Comp. P.D. LEXIS 339 (2010).

either the NFL or the NFLPA.²³⁰

VIII. CONCLUSION AND RECOMMENDATIONS

As Article 41 of the current Collective Bargaining Agreement illustrates, in the absence of further agreement between the NFL and NFLPA or additional changes to state workers' compensation statutes, choice-of-law and choice-of-forum clauses are likely to invite litigation for quite some time.²³¹ Specifically, Section 6 provides that "[t]he parties shall retain the positions they held prior to this Agreement with respect to all existing litigation and arbitration involving workers' compensation issues"²³² Additionally, of the twenty-two states that currently host an NFL franchise, only three have workers' compensation statutes that specifically include professional athletes.²³³ As mentioned above, the majority of state workers' compensation statutes do not expressly mention professional athletes. Thus, an athlete's eligibility in these states is ultimately determined by the courts.²³⁴ Accordingly, such an approach appears to provide at least some incentive for players to file in jurisdictions other than those which are listed in their Player Contracts.

Conversely, the NFL and NFLPA have been able to address the majority of their concerns regarding the offset provisions contained within the Ohio and Missouri statutes, which serve to proportionally limit the benefits already paid to injured athletes.²³⁵ Specifically, in Article 41, Section 4 of the NFL CBA, the two sides agreed that NFL clubs are unable to receive "dollar-for-dollar" credits for prior payments and are instead entitled only to "time" credits.²³⁶

230. *Tupa*, 14 A.3d at 683.

231. *See NFL CBA*, *supra* note 1, at 179.

232. *See id.*

233. *See Teams*, NFL.COM, <http://www.nfl.com/teams>; Modery, *supra* note 63, at 257. Here, "specifically include" refers only to those states that expressly mention professional athletes within the definition of "employee," or include athletes by virtue of endorsement by the Attorney General. For purposes of this Comment, state statutes containing off-set or election provisions will be discussed separately. *See id.* (citing Applicability of Indus. Ins. Act to Certain Athletes, Op. Att'y Gen. Wash. 5 (Feb. 14, 1984), available at <http://www.atg.wa.gov/AGOOpinions/opinion.aspx?section=topic&id=7566>).

234. *See Modery*, *supra* note 63, at 257.

235. *See NFL CBA*, *supra* note 1, at 176; Carlin & Fairman, *supra* note 69, at 111.

236. *NFL CBA*, *supra* note 1, at 176 (providing in relevant part "[n]o Club shall be entitled to claim or receive any dollar-for-dollar credit or offset, other than as provided for in Article 3 of this Agreement, for salary, benefits, or other compensation paid or payable to a player against any award or settlement of workers' compensation benefits, either pursuant to Paragraph 10 of the NFL Player Contract or any provision of state law."); *see also id.* at 176-77 (providing in relevant part "[a]ll Clubs are instead entitled only to a 'time' credit or offset under Paragraph 10 of the NFL Player Contract or state law, as set forth more specifically in Subparts (A)-(E) below. This 'time' credit or offset shall in

In the meantime, in the absence of further agreement, the NFL would be well-served to utilize its unique level of power and influence to engage in political lobbying efforts to persuade states with current or future NFL franchises to enact workers' compensation statutes similar to those which have already been enacted in the District of Columbia and Kentucky.²³⁷ While the District of Columbia's approach of establishing an athlete's "professional work life expectancy," would tend to limit the duration of payments, the Kentucky approach would go a step further by completely excluding athletes of foreign states' teams. This would provide the NFL and its clubs with a highly-desired level of predictability while increasing the enforceability of workers' compensation choice-of-law and choice-of-forum clauses in the future. Aside from the political lobbying itself, the sole cost to NFL and its clubs would be that of self-insurance, a practice which some clubs have been utilizing since 1968.²³⁸ Thus, political lobbying remains a viable, yet unexplored alternative to workers' compensation issues. Those having doubts as to the NFL's ability to impact political agendas may want to consider the recent disputes regarding sports stadiums, eminent domain, and public funding.²³⁹

In deciding where to kick off its political lobbying, the NFL should follow the players' lead and proceed directly to California. Indeed, the legislative policies of California are responsible for the majority of the recent workers' compensation litigation between the NFL and NFLPA. In doing so, the NFL's political influence would be magnified by the presence of the three NFL teams already within the state, as well as the

all cases be expressed or granted as a reduction in the number of weeks of a player's workers' compensation award or settlement that is attributable to the same period of weeks in which the player is deemed entitled to salary payments described in this Part. The credit or offset shall be at the weekly rate specified under the state workers' compensation law in question. Because the period from the beginning of the regular season to the end of the League Year (25 weeks) is approximately 1.5 times longer than the seventeen week period over which players receive salary, the parties agree that, in calculating the 'time' credit or offset as set forth more particularly herein, the Club is entitled to a reduction of 1.5 weeks of a player's workers' compensation award or settlement for each week during the regular season for which a player is awarded or executes a settlement agreement for workers' compensation benefits and for the same period of weeks is paid his full Paragraph 5 Salary").

237. D.C. CODE § 32-1501 (17C) (2012) ("[T]he work life expectancy of a professional athlete is determined separately for each professional sports franchise in the District by the Office of Workers' Compensation through its rulemaking authority."); KY. REV. STAT. ANN. § 342.670 (4) (West 2012).

238. See *Brown v. Cincinnati Bengals*, No. ADJ1220066 (Cal. W.C.A.B. Apr. 19, 2011) (on file with author). Furthermore, under the Kentucky approach, teams are only required to secure insurance within their state of domicile. See KY. REV. STAT. ANN. § 342.670 (4) (West 2012).

239. See *Minneapolis City Council Endorse Downtown Vikings Stadium Plan*, SPORTS BUS. DAILY (Apr. 25, 2012), <http://www.sportsbusinessdaily.com/Daily/Morning-Buzz/2012/04/25/Vikings.aspx> (citing business and labor leaders ability to "put political muscle" behind the stadium effort). See generally Michael Birch, *Take Some Land for the Ball Game: Sports Stadiums, Eminent Domain, and the Public Use Debate*, 19 SPORTS LAW J. 173 (2012).

real possibility of a fourth in the near future.²⁴⁰ Insofar as the actual legislation is concerned, the NFL should push for an approach similar to Kentucky's, discussed above, which would result in the workers' compensation law of foreign states providing the exclusive remedy for athletes that are only temporarily employed within California. Assuming, *arguendo*, that California's historically liberal approach to workers' compensation would not support such a drastic change, an alternative provision could limit the ability of athletes that are employed by a team domiciled outside the forum from receiving cumulative trauma benefits in California. In doing so, all of the parties involved could avoid the seemingly frivolous arguments over whether or not a few games played within California, over the course of the player's entire professional career, significantly contributed to his compensable injuries.²⁴¹ However, this approach would not likely have any effect on California's ability to exercise jurisdiction over acute injuries.

Lastly, regardless of whether the NFL chooses to engage political lobbying, to negotiate a further agreement with the NFLPA, or to utilize some other alternative not discussed herein, it is clear that the NFL should not continue to operate solely under the "protection" of Article 41, Section 6 of the current CBA. Indeed, if the NFL fails to act, its attorneys may begin to suffer from cumulative trauma themselves as a result of the seemingly endless treks to the courthouse.

240. See *Teams*, NFL.COM, <http://www.nfl.com/teams>. The NFL currently has clubs in Oakland, San Diego, and San Francisco; however, in the author's opinion, it is likely only a matter of time before a club returns to Los Angeles.

241. See *Brown v. Cincinnati Bengals*, No. ADJ1220066 (Cal. W.C.A.B. Apr. 19, 2011) (on file with author); *Injured Workers' Ins. Fund v. Workers' Comp. Appeals Bd.*, Comp. Cases 923 (Cal. App. 2001). Indeed, in the absence of an acute injury, such determinations are likely to be speculative at best. Furthermore, these arguments ignore the difficulty involved in separating the trauma that is experienced during a player's professional career from that which occurred as a result of his participation in sandlot, high school, and college football. Simply put, separating injuries of this sort is much more difficult than the typical distinctions between work and home that are made in other contexts. See *Haycraft v. Corhart Refractories Co.*, 544 S.W.2d 222 (Ky. 1976) (apportioning compensation to employee who had suffered two work-related and two non-work related back injuries during his 17 years of employment which required him to perform heavy labor).